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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No. 708.

SAM MICHAELSON, DAN CULLEN, FRED HENSTRA, OLE NORTH, ART DANIELS, JOE RITCHIE, MATT ANDERSON, JOHN HAGEN, ARLEY MARTIN and CLARENCE MICHAELSON, *Petitioners,*

vs.

THE UNITED STATES, ex rel. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioners seek a review of the judgment of the Circuit Court of Appeals of the Seventh Circuit (affirming the judgments of the District Court of the United State for the Western District of Wisconsin) based upon its opinion that the petitioners were "rightly denied" a trial

by jury, to which they were entitled under "the jury provision of the Clayton Act, . . . because that part of the Act is unconstitutional." (Record, p. 162.)

The petitioners were striking employes of the Chicago, St. Paul, Minneapolis and Omaha Railway Company who were accused of violating (by verbal intimidation of other employes) the temporary restraining order of the District Court issued July 20, 1922. After a rule to show cause why they should not be punished for contempt and answers and pleas of not guilty by the present petitioners (then defendants) the case came on for trial August 25, 1922, and a motion for a trial by jury was made by counsel for the defendants as a matter of right under Section 22 of the Clayton Act. This motion was denied. (Record, p. 74.) Following a trial by the judge alone, the defendants were found guilty and fined. The opinion of the Circuit Court of Appeals (printed as an appendix to the present Petition, and also found in the Record, pp. 156–164) holds:

I. That a prima facie case of violation of the injunction was made.

II. That the subsequent dismissal of the railroad company's bill for injunction did not cancel the judgments entered.

III. That the court did not err in overruling the demand for a jury trial.

In reaching its third conclusion the court holds preliminarily:

a. That the defendants, to have the benefit of the Clayton Act "must have been 'employes' within the meaning of the Act."

b. That the violations constituted "criminal offenses" under the statutes of the United States and of Wisconsin.

c. That the intent of the Clayton Act "was to give to the special class in special cases the absolute right to trial by jury."

Thereupon the court holds:

(1) That the defendants "were not engaged in a lawful strike," because the railroad was made by law "a helplessly fettered opponent;" and therefore they should not be classed as "employes."

(2) That "the so-called strike of the shop-craft unions was a controversy with, or a strike against, the Labor Board as an instrumentality of our national government;" and therefore the strikers should not be classed as "employes."

(3) That, assuming the defendants were entitled as "employes" to demand a trial by jury, the jury provision of the Clayton Act is unconstitutional, because "Congress can not constitutionally deprive the parties in an equity court of the right of trial by the chancellor."

Specifications of Error.

The petitioners represent that in each of the three rulings above set forth the Circuit Court of Appeals erred and as a result of each and all of said rulings erred in affirming the judgments of the District Court.

The petitioners particularly represent that the court erred in holding that Section 22 of the Clayton Act is unconstitutional (which holding clearly determined the judgment of the court), and represent that Congress, in providing in the Clayton Act for a trial by jury of offenses "of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed," acted under the express mandates of the Constitution requiring: (1) that "the trial of all crimes shall be by jury" (Article 3); and (2) that " in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury" (Amendment VI).

ARGUMENT.

I.

This is a "Criminal Prosecution" by the United States.

a. It will be noted at the outset that this is a case of "criminal contempt"—and is so described in the opening sentence of the opinion of the Circuit Court of Appeals. If it were a "civil contempt," the contempt proceedings, being interlocutory, would terminate with the disposition of the original case, which was dismissed on motion of the complainant. (Record, p. 131.) Such a dismissal would be without prejudice to the power and right of the court to punish for contempt by appropriate "criminal" proceedings. But contempt proceedings for the benefit of a litigant —"civil contempt"—would end with the withdrawal of the litigant by the dismissal of his bill.

> Gompers et al *vs.* Buck's Stove and Range Co., 221 U. S. 418.
> Worden *vs.* Searles, 121 U. S. 27.

b. The United States is named as complainant by order of court. (Record, p. 125.)

c. The offenses charged are criminal offenses. (Opinion of Circuit Court of Appeals, Record, p. 157.)

(1) Sections 4466a and 4466c of the Wisconsin Revised Statutes for 1921 read as follows:

> "Sec. 4466a. Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in

the county jail not more than one year or by fine not exceeding five hundred dollars."

"Sec. 4466c. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by a fine not exceeding one hundred dollars, or by both fine and imprisonment in the discretion of the court."

(2) The bill of complaint charges that the defendants were acting "in violation of the Statutes of the United States prohibiting conspiracies in restraint of interstate commerce." (Record, p. 15.)

(3) The Circuit Court of Appeals in its opinion holds the strike to be, in effect, a conspiracy against the government.

It appears clearly therefore that the present judgments rest on the presumption (at least) that this is a proceeding by the United States against the defendants to punish them for violations of the order of the District Court, which violations are also criminal offenses under the Statutes of the United States and of the State of Wisconsin.

Certainly the proceeding is not a civil action by a private party for the establishment of his rights. Therefore it is remarkable to observe that the Circuit Court of Appeals holds that, in this criminial prosecution by the United States, a right of trial by jury specifically granted by Act of Congress may be denied on the ground that "Congress can not constitutionally deprive the *parties* in an equity court of the *right of trial by the Chancellor.*" (Italics ours.)

The court holds, in effect, that the United States has a constitutional "right of trial by the chancellor" in a proceeding wherein the Congress of the United States has provided that the defendant shall be entitled to a trial by jury! The peculiar logic and absolutely unprecedented character of such a ruling present strong reasons for the issuance of a Writ of Certiorari.

II.

There is no "inherent power" in the chancellor to punish summarily indirect contempts.

It is quite commonly assumed that the power of the chancellor to deal summarily with cases of direct and indirect contempt has been recognized and exercised from "time immemorial." It appears on the contrary that for hundreds of years even direct contempts (including violent conduct in open court) were uniformly dealt with by information, presentment or indictment *and trial by jury*. This is shown by a review of all the known cases of contempt from the time of the Magna Charta to the death of Henry V. (Mr. Solly Flood in Transactions of the Royal Historical Society, New Series, Volume 3, 1886.) Later developed the practice of the court dealing summarily with direct (or active) contempt and meeting out punishment; and also the practice of summary imprisonment *to compel obedience to a decree.*

> "Thus imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king *Down to within a century* it was very doubtful if the chancellor could under any circumstance inflict punishment for disobedience to a decree. . . .
>
> "It thus appears that imprisonment for contempt of the chancellor's decree, or rather for contempt of the king's writ issued in execution of such decree, was not punitive but coercive; and that anything in the nature of a sentence to a definite punishment, like a fine or an imprisonment for a term, was entirely foreign to the process."
>
> Joseph Henry Beale, Jr., in Harvard Law Review, January, 1908.

It is submitted that it is "very doubtful," if, when the Constitution of the United States was written, there was any recognized, "inherent" authority in a court of equity

to *punish* summarily for indirect contempts. Yet the holding of the Circuit Court of Appeals that an Act of Congress is unconstitutional rests wholly on this "very doubtful" basis. The court holds that when Congress creates a court of equity "the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution." But does the Constitution pour into that vessel judicial power not commonly exercised by courts of equity when the Constitution was written? Or does the Constitution continue to pour into that vessel any judicial powers that courts of equity in this or other lands take unto themselves from time to time—even in opposition to the express enactments of the law-making branch of the government—even in repudiation of the precedents of hundreds of years?

III.

The petitioners were "employes" within the meaning of the Clayton Act.

The Court of Appeals agreed with counsel for the petitioners that a strike does not of itself terminate the relation of employer and employe—*in private industry*. But, the court made a "legal distinction" regarding strikes *in the transportation industry*, holding that *such* strikes severed the relationship. It is submitted that the same factors which determine the status of employes on strike in other industries determine the status of employes on strike in the transportation industry.

Does the relationship of employer and employe continue during a strike or lockout?

In order to answer this question, it is necessary first to consider what a strike is. It will be evident immediately that it is not a quitting of *employment;* otherwise the

strikers would have no further interest in the business which they had abandoned and many of the controversies incident to a strike would never reach the courts. The following definitions of a strike are helpful in reaching an understanding of its effect upon the relationship of employer and employe:

WHAT IS A STRIKE?

> "A strike is a stoppage rather than an abandonment of work." 31 Yale Law Journal, page 321.
>
> "A combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand." Farmers L. & T. Co. *vs.* Northern Pacific Railway Co., 60 Fed. 803, 821.
>
> "A combination among laborers, to compel an increase in wages, a change in hours of labor, some change in the mode or manner of conducting the business of the principals or to enforce some particular policy in the character or number of the men employed, or the like." Del. etc. Railway Co. *vs.* Bouns, 58 N. Y. 573, 582.
>
> "The act of quitting work specifically, such an act by a body of workmen done as a means of forcing compliance with demands made on their employer." Longshore Printing Co. *vs.* Howell, 26 Oregon 527, 541.
>
> "A combination among employes having for its object their orderly withdrawal in large numbers or in a body from the service of their employers on account simply of a reduction in their wages is not a strike within the meaning of the word as commonly used." Arthur *vs.* Oakes, 63 Fed. 310.

The effect of the above definitions is well summed up in the following case which shows the essential element in a strike is the intention to return to work.

> "In the common acceptation of the term it is not a 'strike' for the workmen of an employer to quit

his employment and go elsewhere, without any intention of returning, nor is it a 'strike' for workmen to refuse to enter into the employment of a particular contractor. A 'strike' in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand that they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body when they quit without intention to return to the work whatever may be the reason that moves them so to do."

Uden *vs.* Schaeffer, 188 Pac. 395, p. 396, Supreme Court of Washington, 1920.

What is the Effect of a Strike Upon Relationship of Employer and Employe?

In Iron Moulders' Union *vs.* Allis-Chalmers Company, 166 Fed. 45, the concurring opinion of Judge Grosscup reads as follows:

"The foregoing opinion so compactly and clearly sets forth the correlative rights and the correlative obligations of employer and employes when engaged in a strike or lockout, that it is with hesitation that I add this word; and I only add it that nothing that is contained in the opinion, may be construed to relate to the correlative rights and the correlative obligations of employer and employes in any relationship other than their somewhat anomalous relationship pending a strike or lockout.

"A strike is cessation of work by employes in an effort to get for the employes more desirable terms. A lockout is a cessation of the furnishing of work to employes in an effort to get for the employer more desirable terms. Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employes who remain to take part in the strike or weather the lockout do so that they may be ready to go to work again on terms to which they shall agree—the em-

> ployer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employe that is neither that of the general relation of employer and employe, nor again that of employer looking among strangers for employes, or employes seeking from strangers employment. And it is with respect to this somewhat anomalous relationship that, as I understand it, this opinion speaks; a statement that it seems to me ought to be made to confine the opinion to the actual situation to which it is intended to relate—to differentiate what we say from what might arise in cases where, neither strike nor lockout pending, persuasion is resorted to to induce other employers not to employ given applicants for employment, or to persuade employes not to take employment with given employers, upon which questions we do not as I understand it, express any opinion."

A recent Canadian case passes directly on the question now under consideration. In this case there was an indictment against an agent of the United Mine Workers of America for aiding an employe to continue a strike by giving merchants cheques for goods supplied to strikers on his order. The indictment was based on the Industrial Disputes Investigation Act which made the giving of such aid to an "employe" unlawful. A defense was raised that as the man was on a strike he was not an employe and to this the court replied:

> P. 491: "Then it is said that Morien was not an employe when the assistance was given, because he had gone out on a strike sometime previously, but it will be noted that he was not dismissed by the company and that it was open to him to return to work if he chose. If such an argument could prevail, then all men who go on a strike would cease to be employes, then the Act would be useless.
>
> "The magistrate finds as a fact that said Francis

> Morien went out on a strike with other employes on the 9th of July, 1909, and was an employe of the said Invernes Railway & Coal Company at the time, and as such employe continued on strike up to and including the date of the laying of the information.
>
> "I think his finding was right, and that Morien was and remained an employe of the company in the same way as all others who went on strike with an avowed purpose of compelling the company to comply with their demands."
>
> Rex *vs.* Neilson, 44 N. S. 488.

It appears from the above authorities that a strike itself does not terminate the relationship of employer and employe. So long as a striker holds himself ready to return upon acceptable conditions, and the employer holds himself ready to use his services upon acceptable conditions neither party has taken an action completely severing the relationship. Of course, it may be open to the employer to discharge the strikers and to terminate all relationship, using the strike as a cause. But the strike *itself* does not accomplish this result.

It may be here noted that during the shopmen's strike the railroads repeatedly addressed the shopmen in advertisements calling upon them as "employes" to return to work. It is doubtful whether a single railroad ever took definite action to terminate absolutely the relationship previously existing between the road and the shop craft employes. It was repeatedly asserted, for example, that pension rights of employes were being preserved.

Perhaps a consideration of what constitutes an "employment" may clarify the situation. A relationship of employment may exist without activity on the part of either employer or employe. It is not dependent upon the rendering of service or the payment of wages. A contract of employment may exist wherein during periods of idleness no work is being done or wages paid, but the relationship of employer or employe continues. A contract may exist providing for

arbitration of grievances. One of the grievances covered may well be the laying off of men without just excuse and it would be clearly absurd to say that the employer by laying off men could terminate the relationship and thereby make the protections in the contract of employment ineffective.

A very good example of the continuance of the relationship of employer and employe in connection with the railroads (despite the cessation of work and payment of wages), is found in the rules governing the work of the shop craft employes affecting all important railroads and particularly the one concerned in the present case. These rules, as promulgated by the Railroad Labor Board and put in force, provide, for example, as follows:

Rule 27 requires that when forces are reduced senority shall govern and that "in the restoration of forces senior laid-off men will be given preference in returning to service."

Rule 28 provides as follows:

> "Employes laid off on account of reduction in force, who desire to seek employment elsewhere, will, upon application be furnished with a pass to any point desired on the same railroad."
>
> (See Decisions U. S. R. R. Labor Board, Vol. II, pp. 576, 577.)

This last rule is particularly impressive as showing that men laid off on account of reduction in forces are still regarded as employes because otherwise the carrier would be violating the law in furnishing them with passes. (See Interstate Commerce Act, Sec. 1 (7), Sec. 22.) It cannot well be argued that the railroads, with the sanction of the Railroad Labor Board, have agreed to violate the law and furnish passes to persons not employed. The natural conclusion is that all persons concerned with the transportation industry recognize that the relationship of employer and employe continues even when employes are not actually working for the railroad or receiving wages.

The question now arises: Is there a distinction between

men furloughed or locked out and men on strike? These are, of course, different happenings but, is their effect any different upon the relationship of employer and employe. A reduction of forces and a lockout are often practically indistinguishable. The cause may be subject to dispute, but the effect is the same. A railroad may claim it is necessary to reduce forces because it cannot afford to furnish work at the wages demanded. To the men this appears to be a lockout, but it is called a reduction of forces and the men are technically on furlough. The distinction between a lockout and a strike is likewise often so finely drawn that it is difficult to argue that the status of the employe on strike is different from that of the employe locked out.

For example, in the shopmen's strike (reference may be made, if the facts are not regarded as within judicial knowledge, to the case entitled U. S. *vs.* Railway Employes' Department, et al., 283 Fed. 479, and 286 Fed. 228), the employes suspended work as a protest against wages, working conditions and practices of the railroads, and sought conference with railway managements for adjustment of these differences. After a month of the strike the President of the United States sought to bring the contending parties together and as a result of his efforts the employes agreed to return to work under the rules and working conditions against which they protested, but with the understanding that the railroads would abandon the condemned contract-out practice. But the railroad managements as a whole refused to restore the employes to their positions with seniority rights unimpaired. Eventually a large number of railroads did negotiate a settlement upon the understanding that seniority rights would not be impaired. In these controversies some railroad managements may have taken the position, for tactical advantage, that the strikers would not be regarded as old employes. On the other hand, it is equally clear that many railroads took the position that they were to be regarded as old employes.

It appears that where the question of the existence of a relationship of employer and employe is a matter for judicial determination the court may find an answer to the question in individual instances in the conduct of the parties. But as a broad question to be decided in interpreting a statute, the court must look rather to the legislative intention to determine how the words "employer and employe" have been used. The purpose of such legislation as the Clayton Act is to deal with industrial conditions and relations in a broad way and it would be destructive of the legislative intention to construe the words used in such a technical sense as to make it possible for private persons to defeat the effective operation of the Act. (See Duplex Printing Co. *vs.* Deering, 254 U. S. 443, particularly the dissenting opinion.) The force of this contention is doubled when one considers the provisions of the Transportation Act in connection with provisions of the Clayton Act.

The Transportation Act provides for the adjustment of disputes between carriers and employes in order to prevent interruptions of interstate commerce. The Act provides for the representation of employes through their organizations. If, when a dispute arises between a carrier and its employes resulting in the cessation of work, either through a lockout or through a strike, it should be held that the workers concerned can no longer be regarded as employes, then the provision for their representation through their organizations would be nullified. Thus the purpose of the Act would be defeated. The Transportation Act recognizes that those men who are trained to perform, under direction of management, the services necessary for the operation of the railroads are to be regarded as railway employes who may be organized in associations to promote their common interests, the membership of which cannot be arbitrarily diminished by the action of management in temporarily refusing to furnish work. In like manner the membership of these organizations is not diminished by the refusal of groups

of members to perform work under non-acceptable conditions. The organized employes must be regarded as "employes" whether all the members are actively engaged in rendering service or not. (See construction of word "employes" in the majority opinion in the Duplex case, *supra.*)

Conclusion as to Status of Employes.

One of the essentials in the administration of justice is that the courts shall deal with *facts* and with the practical considerations which affect the conduct of individuals whose interests are submitted to their judgment. It is quite well settled as a matter of fact, as indicated by authorities previously cited, that a strike is not a withdrawal from *employment* or a quitting of *employment;* but is intended to be, and is, a stoppage or suspension of *work* for the very purpose of improving the conditions of employment. As a practical consideration both parties to an industrial dispute of any magnitude regard the period of a strike as one of a *changed,* but not a *terminated,* relationship of employment. To assert that the relationship of employer and employe no longer exists when a strike or lockout occurs would be to assert that which is contrary to fact and to give the parties in contemplation of law an attitude toward each other which they themselves have not assumed. It is entirely appropriate to recognize that there is a *change* in the relationship, but quite inappropriate for a court to bring about a consequence in law which has not resulted in fact from the conduct of the parties.

The Court of Appeals goes outside the Record and makes Findings unsupported by Evidence.

The opinion of the Court of Appeals, denying to striking employes in the transportation industry the rights of striking employes in other industries, is based upon a finding of fact in regard to conditions in the transportation industry which

has no foundation in any evidence appearing in the Record and which is, in fact, a wholesale misstatement of conditions existing in this industry.

The opinion of the court includes the following startling statements which are contrary to facts which could be easily established:

> "From the foregoing considerations it is apparent that interstate railroads are bound hand and foot . . . . They cannot exert any sort of 'economic pressure' in any sort of 'industrial combat.' They are powerless to use the 'lockout' as a weapon against their employes."

Any consideration of the voluminous records of events preceding the shopmen's strike, which were not presented for the consideration of the court, would show that the above quoted statements deny the possibility of events which occurred repeatedly. They startle the informed person as would a statement by the court that the world is flat and immobile.

The decisions of the United States Railroad Labor Board (Vols. I, II and III) shows, for example:

The Western Maryland Railroad *locked out* its entire shop craft organization long before the shop craft strike. The Erie Railroad *locked out* its shopmen by contracting out its shops to private contractors who claimed to have all the powers of men engaged in private business. The whole purpose of this "contracting out" scandal, which was one of the chief causes of the shopmen's strike, was to exert *economic pressure* upon shop craft employes. The Buffalo and Susquehanna Railroad openly and publicly announced it would send away its shop work if its demands before the Labor Board were not met.

The New York Central and the Pennsylvania Railroads were each found by the Interstate Commerce Commission to have wasted at least $3,000,000 a year in sending away shop work to private shops; and the records show that at

the same time shop craft employes in large groups were laid off by these railroads. Was this not exerting *economic pressure* and to all intents and purposes using the *lockout* as a weapon? (Construction and Repair of Railway Equipment, 66 I. C. C. 694, 732.)

The court seems to have fallen into the error of regarding the *shop craft* employes as in the same situation as the *transportation* employes. As a matter of fact, the railroads have shown that they could exert heavy economic pressure upon the transportation men, but not to the extent to which pressure has been exerted against the *shop craft* employes. It has been the repeated contention of the railroads that the shopmen were not engaged in work essential to interstate transportation; and that the carriers therefore could lawfully contract out this work to private companies.

In combating the *shop craft* employes, railroads have reduced forces repeatedly without any excuse in diminishment of work, but solely as a means of exerting economic pressure. Over and over again the shop craft organizations have seen hundreds and thousands of men deprived of their jobs as a means of coercion. Yet the court holds that the railroads cannot exert any sort of economic pressure, and that they are powerless to use the lockout.

Chief Justice Marshall of the United States Supreme Court once said that "Congress could do many things but that it could not alter a fact." (See opinion of Justice McLean in Penn. *vs.* Bridge Co., 18 How. 421, 439.) It is respectfully submitted that the United States Circuit Court of Appeals cannot alter facts by judicial opinions, and that assertions not supported by any evidence should not be made the basis for expressions of judicial opinion upon which judgments are entered.

There is no record in the present case of any evidence (either oral or documentary) upon which could be based the findings of the court now complained of. If evidence *had been* presented it would have appeared that on August 2d (23 days before the contempt hearing) the railroad had

rejected the offer of the striking employes to return to work under the wages and rules established by the Labor Board, had rejected the settlement offer of the President of the United States, and was conducting a *lockout,* in defiance of the President. It would appear that the railroad was exerting considerable "economic pressure" for a "helplessly fettered opponent."

On the basis of unfortunate and quite unfounded assumptions the court makes the sweeping assertion that "plaintiffs in error were not engaged in a lawful strike." Apparently the conclusion of the court that the strike was unlawful is based upon its opinion that the statutes should be interpreted "to forbid an assault upon a helplessly fettered opponent," and upon the assumption that the railroads of the country are to be regarded in judicial contemplation as "helplessly fettered opponents" in combats with their employes. It is submitted that this assumption is made upon a record presenting no supporting evidence of its validity.

The opinion proceeds then to assert that the cause of the strike was the refusal of the employes to abide by a decision of the Labor Board, and, that therefore, the strike was "a controversy with, or a strike against, the Labor Board."

The court seems to be unaware that prior to the strike, the employes had protested against some 104 violations of the Transportation Act or decisions of the Board by 92 railroads. The records of the Labor Board and of the Supreme Court show that the Pennsylvania Railroad, a ring leader of the combined railroad executives, had repeatedly defied the Labor Board. The records of the Labor Board also show that the railroad managements were acting through a national association formulating and carrying out common policies against the interests of the employes. When the rulings of the Labor Board (for example, the ruling against the contracting out practice) were unsatisfactory to railroads, they refused to conform to them. Of all these statements there is ample evidence available. The

railway employes united in striking, not merely against a wage decision as the court mistakenly asserts, but against (1) a reduction of wages, (2) against changes in working rules, and, most important of all, (3) against the unlawful contracting out practices which were destroying their means of self defense. This united action of the employes, not in offense but in defense, against a united attack against them is stated by the court to be a strike against the Labor Board and "to be classed with the insurrection of the Boston policemen."

With all due respect, it is suggested that such statements in an opinion of this high court reflect grave discredit upon judicial processes. They are not based upon a record before the court but apparently upon information gathered from outside sources. They do not represent, therefore, properly formulated judicial opinions. They represent rather a gratuitous condemnation by the court of parties not before the court upon issues which have not been tried out in the court.

IV.

Trial by jury is an absolute right under the provisions of the Clayton Act.

It appears that the Court of Appeals agrees with the construction of the Clayton Act submitted by counsel for petitioners showing that its intent is to provide for trial by jury as a matter of right, in the instances specified. Inasmuch, however, as a contrary position was taken by opposing counsel it may be appropriate to refer briefly to the mandatory phrasing of the law.

The pertinent sections of the Clayton Act read in part as follows:

> "Sec. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States

> or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided. (38 Stat. L. 738.)"
>
> "Sec. 22. * * *
>
> "In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."

Under the above provisions the first mandatory requirement is that if an injunctive order is disobeyed by the doing of an act which would be "also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed," the offender *shall* be proceeded against for contempt as provided in Section 22 of the Act. The present brief is not concerned merely with the State statute as that would involve only an issue local to this case. It is a matter of more general concern to see whether the acts here involved may be regarded as constituting criminal offenses under any statute of the United States.

We find the charge made in the bill of complaint that the defendants were acting "in violation of the Statutes of the United States prohibiting conspiracies in restraint of interstate commerce and for the purpose and intent of deliberately interrupting, interfering with and obstructing traffic upon the lines of Plaintiff carrier." (Record, p. 15.)

We find the restraining order recites that the plaintiff is entitled to an order "restraining the defendants herein and those affiliated, acting, co-operating, confederating, combining, conspiring, agreeing or arranging with them from doing the acts therein complained of and threatened to be committed," and also that the injuries to be prevented are "injuries to, obstructions of and interference with plaintiff's business as a common carrier in interstate commerce."

While naturally protesting against any such interpretation of the strike of the shop crafts (here defined to be a criminal conspiracy), it is apparent (1) that the complainant railroad sought relief upon the allegation that defendants were engaged in the criminal conspiracy in violation of the statutes of the United States; (2) that the court entered its restraining order against acts which the court determined should be prohibited as a part of said conspiracy; and (3) that the violations of that order of which the court found the defendants guilty must, therefore, have been regarded by the court as acts of conspirators which would have constituted criminal offenses under the statutes of the United States. Therefore, it is properly to be assumed that *under the rulings of the court* the provisions of the Clayton Act should have been applied.

The next question arising is, whether, under Section 22 of the Clayton Act, a demand having been made for a trial by jury, it was *necessary* or was a matter of discretion for the court to grant a trial by jury.

Is Trial by Jury Mandatory?

On first impression in reading Section 22, it might appear that the court has an option to grant a trial by jury, or to deny it because of the words "the court may impanel a jury." On careful reading, however, it will appear that the option of the court is either to "impanel a jury from the jurors then in attendance," or to "cause a sufficient number of jurors to be selected and summoned, as provided

by law," etc. But the provision is mandatory that at the time of the trial "a jury *shall* be selected and impaneled as upon a trial for misdemeanor." The provision is also mandatory that "such trial *shall* conform, as near as may be, to the practice in criminal cases," etc.

It is indeed a strange construction of the Clayton Act to urge that an act passed specifically for the purpose of insuring a trial by jury in certain classes of contempt cases shall be construed to leave the matter entirely within the discretion of the court, since it is obvious that the purpose in the passage of the Clayton Act was to prevent that which had been vigorously and widely attacked as an abuse of the powers of courts in conducting criminal prosecutions through equity procedure without allowing the accused the right of trial by jury, supposedly granted by the Constitution. (See dissenting opinions in Duplex Case, *supra*, and in Truax *vs.* Corrigan, 66 L. Ed. 132.)

It may be observed that the power of the courts to carry on criminal prosecutions without a jury through the means of contempt proceedings has been a matter of most serious dispute among those learned in the law, both of the bench and the bar, ever since this power was first asserted. The establishment of this power has been marked by such vigorous dissenting opinions that there can be little question, that if a different spirit had prevailed in the courts the so-called "law" of today whereby crimes are prosecuted and punished through equity procedure would not be the law. It may be appropriate to quote from two notable dissents. First, from the Supreme Court of Massachusetts:

> "It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity or by a court acting without a jury and subject to no limitations upon its power to fine and imprison except its own discretion."
>
> Carleton *vs.* Rugg, 145 Mass. 550.

Second, from the United States Circuit Court of Appeals where reference is made to the historic trial of William Penn:

> "With all their astuteness and eager desire to serve the Crown it never occurred to the judges in those days to enjoin the Quakers from meeting and Penn from preaching to them. This 'short-cut' would have gotten rid of the jury and placed Penn and his followers completely in the power of the judges; and instead of becoming the founder of a great city and commonwealth in a free republic, he would have languished in an English prison for contempt of court incurred by preaching to his congregation, for he avowed in court, 'that all the powers upon earth' could not divert or restrain him from that duty."
> Hopkins *vs.* Oxley Stave Co., 83 Fed. 912.

It may also be recollected that the decision of the United States Supreme Court in the Debs Case aroused as great a volume of protest and condemnation as perhaps any decision which has ever emanated from the court.

In view of this history we find the supreme legislative body of the nation enacting a law which in simple language provides that where a man is to be punished through contempt proceedings for a criminal act he shall be granted the right of trial by jury, which is guaranteed by the Constitution in all "criminal prosecutions."

If the court regards this legislative enactment as in excess of legislative power and as an unwarranted interference with the Judicial Department, such a holding would at least be a frank expression of the judicial conviction, but to suggest that the court should hold an Act, the whole purpose of which was to insure a trial by jury in certain circumstances *regardless* of the wishes of the presiding judge, to be an Act leaving this matter within the *discretion* of the judge is simply to ask the court to pervert the obvious meaning and purpose of the Act, to thus amend the Act and thereby indirectly to exercise the *legislative power* which has not been conferred upon the judiciary.

In this connection it may be pointed out that while the Supreme Court of the United States *has held* that equity jurisdiction is not ousted by the intrusion of criminal acts, it is also clear that the court *could have held* that equity jurisdiction could not be invoked for purposes of *punishment* when a civil wrong was perpetrated by criminal means, and that *punishment* (which is not civil redress) must be brought about through the processes of the criminal law.

It was one of the purposes of the Federal Constitution to prevent a revival of abuses that had arisen under the English judicial procedure. One of the complaints in the Declaration of Independence, which has been sometimes referred to as expressing the *spirit* of the Constitution, was a charge against the King "for depriving us in many cases of the benefits of trial by jury." It has been a sad commentary upon the development of American law, that, *with the aid of English precedents,* the benefits of trial by jury have been denied in a most important class of cases. It was clearly the purpose of the Clayton Act to restore trial by jury as a *right* in that class of cases. The issue of a right to trial by jury should be decided, not upon a torturing construction of the words of the Clayton Act, which are far from ambiguous, but upon meeting squarely the question: Is this provision of the Clayton Act constitutional?

V.

The Provision of the Clayton Act Granting Absolute Right to Trial by Jury is Constitutional.

There is a long line of opinions to the effect that the inferior Federal Courts are creatures of congressional legislation and that the legislative limitations placed upon their jurisdiction and its exercise are binding upon them. See 4 Fed. Statutes Annotated, 2nd Ed., page 846.

The general principle is stated in the Annotations as follows (p. 847):

> "The law is well settled that the courts of the United States inferior to the Supreme Court are mere creatures of Congress and possess no powers except those specifically granted to them by an Act of Congress and this limitation applies to all causes which under the Constitution Congress might have granted to the national courts jurisdiction to hear and determine."

In ex parte Robinson, 19 Wall. 505, 506, in the opinion of Mr. Justice Field, it is held:

> "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power (to punish for contempts) but the power has been limited and defined by the Act of Congress of March 2, 1831. The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court which derives its existence and powers from the Constitution, may perhaps be a matter of doubt, but that it applies to the circuit and district courts there can be no question. *These courts were created by Act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.* The Act of 1831 is therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases. * * * The law happily prescribes a punishment which the court can impose for contempt. The 17th Section of the Judiciary Code of 1789 declares that courts shall have power to punish contempts of their authority in any cause or hearing, before them by fine or imprisonment, at their discretion. *The enactment is a limitation upon the manner in which the power shall be exercised and must be held to be a negation of all other modes of punishment.*" (Italics ours.)

But it is asserted that the power to punish for contempt is "inherent" in the court and that a court being established,

the legislature cannot limit this inherent power to punish for contempt without invading with an exercise of legislative power, the exclusive domain of judicial power. An exhaustive brief might be written upon this broad question. The main line of argument would be of the following character: Since the establishment of inferior courts is left to the discretion of Congress and their jurisdiction may be limited by Act of Congress, it would seem that the creature could not exercise a power not conferred, but in fact expressly denied to it by its creator. To use an old metaphor—the stream can not rise higher than its source. This position has, however, been exhaustively discussed in various cases, with which the court is doubtless familiar. It is the purpose of the present brief merely to discuss the question from another viewpoint than that which has apparently received consideration heretofore, as indicative of the desirability of issuing the writ of certiorari, in order that this important issue may be determined.

Let it be assumed that Congress, having exercised its power to establish District Courts, has then provided that where a contempt case is presented which has the character of a criminal prosecution, the "court" which shall exercise the judicial power shall consist of *both judge and jury.* This is in fact the requirement of the Clayton Act. Does such a law operate to deprive the "court" of any power, or does it merely prescribe the manner in which the power shall be exercised, or, to put the matter more precisely, does not the law merely designate *what shall constitute a "court"* for the trial of contempt cases?

What Is a "Court"?

It seems to have been assumed in a great many of the opinions upon this question that a "court" consists of a *judge* and that judicial power can only be conferred upon and exercised by a *judge.* It is, however, well settled that a "court" is a tribunal—an incorporeal being.

"The words 'judge' and 'court' are frequently used as convertible terms, but strictly speaking this is a misuse of the terms, as a judge alone does not constitute a court. The term 'court' may be construed to include a jury as well as judges and a clerk, or as used in contra-distinction from a jury, according to the connection and object of its use."

8 Am. & Eng. Enc. of Law, 2nd Ed., page 22.

"This becomes entirely clear when we free our minds from the popular notion that the judge is the court. He is a constituent part of the organiaztion, but he is not the court. Nor is the court room the court, nor the jury room, nor the petit jury. The court is the totality of the constituent parts. It consists of the entire judicial organization for the trial of causes and it is immediately present whenever and wherever—from the opening to the adjournment of the sitting—these constituent parts are actually performing the functions devolving upon them by law."

In re Choate, 18 Civ. pro. rep. 186 (N. Y.).
People *vs.* Barrett, 18 *Ibid.* 230, affirmed in 121 N. Y. 678.

"The term court may include a judge and a jury," is a statement in 15 Corpus Juris, page 717, followed by one-half a column of citations, including the following:

"The word 'court' in the statutes is used in its generic sense and includes both judge and jury in a case where a jury is present."
People *vs.* Molineux, 168 N. Y. 264, 329.

On the same page of Corpus Juris appears, supported by citations:

"The words judge and court are frequently used as controvertible terms, but they are not strictly synonymous, and a judge alone does not necessarily constitute a court, for while the judge is an indispensable part, he is only a part of the court."

There is an Illinois case which makes pertinent application of the doctrine above outlined. In Mascall *vs.* Commissioners of the Drainage District, 122 Ill. 620, the question arose as to whether a land owner was entitled to a jury on an appeal to the county court. It was argued that the language of the act referred constantly to what the "court" should do, including such acts as fixing costs, and it was contended that a jury could not have been intended. The opinion of the Supreme Court, page 623, reads in part as follows:

> "The word *court* is, undoubtedly, often used in the sense of *judge*, and whenever the word *court* and the word *jury* are used in contradistinction to each other, it has that meaning, but in its general sense it means the tribunal by which justice is judicially administered. (Coke on Littleton 58a.) Thus, our Constitution provides: 'The judicial powers shall be vested in one *Supreme Court, circuit courts, county courts,*' etc. (Sec. 1, Art. 6.) *Circuit courts* shall have original jurisdiction of all causes in law and equity, etc. *County courts* shall be courts of record, and shall have original jurisdiction in all matters of probate, * * * and such other jurisdiction as may be provided for by law. (Secs. 12, 18, Art. 6.) One *judge* shall be elected for each of the circuits. (Sec. 13, Art. 6.) And there shall be elected in and for each county one county *judge*. (Sec. 18, Art. 6.) The inviolability of the right of trial by jury, 'as heretofore enjoyed,' is guaranteed. (Sec. 5, Art. 2.) But since all judicial power is invested in *courts*, it inevitably follows that a jury is an integral part of the court, in all cases where, at common law, there was the right of trial by jury."

It follows from the above reasoning that when the Constitution of the United States provided that the judicial power should be vested in one Supreme Court "and in such inferior courts as Congress may from time to time ordain and establish" (Art. 3, Sec. 1), there was no limitation fixing the exact portion of the judicial power which should be vested in the *judge* as a constituent part of the court. Cer-

tainly since the inferior Federal Courts were to be such courts as Congress might establish there was ample power conferred upon Congress to direct in what manner and with what constituent parts such inferior courts should be established and function. Therefore, how can it be contended that the Constitution *prohibits* Congress from establishing as the "court" for the trial of a certain class of cases a tribunal consisting of a judge and a jury?

Furthermore, the Congress was under express mandate to carry out the purpose expressed *in the same article* that "the trial of all crimes shall be by jury"—a purpose reiterated in the Sixth Amendment in the provision that, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," etc.

Again, may it not be suggested that it is properly the function of the Legislative Department rather than the Judicial Department to determine what *are* "criminal prosecutions?" The Congress has passed a law providing that where a person is to be punished for an act which would constitute an offense against a federal or state statute, he shall be entitled to a trial by jury. In other words, *Congress has provided that the inferior court established for the exercise of judicial power in this class of cases shall consist of a judge and jury.* May it not be suggested that under these circumstances the attempt of a judge, who is only a part of the court, to exercise the judicial power conferred upon the *entire court* is a usurpation of authority not conferred upon him?

If Congress had established a District Court to consist of three judges of whom a majority must agree, in order to render judgment, would it not be an unlawful act for one judge to exercise alone any of the powers of the court? Is it not equally unlawful when an inferior court is constituted by act of Congress as consisting of a judge *and* jury, for the judge *alone* to attempt to exercise the power conferred upon that court?

There seems to be an all too prevalent delusion that a con-

tempt of court is the contempt of an *individual* who, to assert and maintain *his* authority, must have the right to punish disobedience of *his* orders. In fact a court is an incorporeal being. It may be that in the functioning of a court a judge alone issues an order, but it is not the order of the *judge* but the order of the *court*. Provision is made by the Congress which created and established that court that, in the event of certain offenses against the dignity of the *court* which are also offenses against the criminal law, the tribunal which shall convene as a court to try, and either to acquit or punish, the alleged offender shall consist of a judge *and* a jury.

It may be regarded as an effort to sanctify the individual rather than the institution to argue that the *man* who issues an order, alone shall judge and punish an alleged disobedience. It is submitted that in order to protect our institutions, which is the justification of the judicial power to hold laws unconstitutional, it is most important that emphasis should be laid upon the necessity of preserving the power of the *institution* rather than the power of the *individual* who occupies a public office.

The judicial power is reposed in the courts. For the exercise of that power the "court," in criminal prosecutions, has been established as a tribunal consisting of a judge and a jury. Thus the institution of trial by jury for persons accused of criminal acts is preserved as one of the most sacred institutions of democracy. For the judge of a court to attempt to exercise alone the power reposed jointly in the judge and a jury is to undermine this institution, the preservation of which is commonly regarded as essential by those who desire to maintain the American form of government.

Respectfully submitted,

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